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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 66

JAMES GOBER, JAMES ALBERT DAVIS, ROY HUTCHINSON, ROBERT J. KING, ROBERT PARKER, WILLIAM WEST, ROBERT D. SANDERS, ROOSEVELT WESTMORELAND, JESSIE WALKER, WILLIE J. WILLIS,

Petitioners,

—v.—

CITY OF BIRMINGHAM,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE ALABAMA COURT OF APPEALS

REPLY TO BRIEF IN OPPOSITION TO CERTIORARI

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 694

JAMES GOBER, JAMES ALBERT DAVIS, ROY HUTCHINSON, ROBERT J. KING, ROBERT PARKER, WILLIAM WEST, ROBERT D. SANDERS, ROOSEVELT WESTMORELAND, JESSIE WALKER, WILLIE J. WILLIS,

Petitioners,

—v.—

CITY OF BIRMINGHAM,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE ALABAMA COURT OF APPEALS

PETITIONERS' REPLY TO BRIEF IN OPPOSITION TO CERTIORARI

Petitioners have received respondent's Brief in Opposition to the Petition for Certiorari filed in this case and hereby reply pursuant to Rule 24(4) of the Rules of this Court.

I.

Adequacy of service.

Respondent claims (Br. of Respondent, 5, 9, 10) that this Court lacks jurisdiction to entertain the Petition because the Petition and Notice of Filing of the Petition were served upon MacDonald Gallion, Attorney General of the

State of Alabama, and James M. Breckenridge, rather than Watts E. Davis and William L. Walker. Messrs. Walker and Davis are Assistant City Attorneys of Birmingham; Mr. Breckenridge, upon whom service was made, is their superior, the City Attorney, as is evidenced by copy of the letter accompanying Respondent's Brief in Opposition, reproduced, *infra*, p. 1a. Petitioners submit, therefore, that this objection is without merit, see *infra*, p. 1a.

II.

Mode of raising constitutional questions.

Respondent implies that petitioners did not properly raise constitutional objections in the courts below and that petitioners' constitutional objections were not passed upon by the Alabama Courts.

Specifically, respondent argues that Birmingham's segregation in eating facilities ordinance was not *pleaded* in the trial court and does not appear in the records and that, therefore, this Court should not consider it now. The theory of judicial notice is, however, that regarding propositions involved in the pleadings, or relevant thereto, *proof* by evidence may be dispensed with. 9 Wigmore, §2565, p. 531. As it is beyond question that the Courts of Alabama are required to judicially note ordinances of the City of Birmington, see Br. of Petitioners, 7, n. 4,[1] the only possible objection which can be made is that the

[1] Title 7, Code of Alabama, 1940, Section 429(1) (Approved June 18, 1943) states:

"JUDICIAL NOTICE OF THE ORDINANCES OF CERTAIN CITIES.—All courts in or of the State of Alabama shall take judicial notice of all the ordinances, laws and bylaws of cities of the State of Alabama which may now or hereafter have a population of 200,000 or more people according to the last or any succeeding federal census."

ordinance is not relevant to questions raised by the pleadings. Petitioners, however, clearly raised the contention that they were arrested, prosecuted and convicted because of state enforcement of segregation (e.g. Gober, 5-7, 9-11). Moreover, these contentions were rejected by the Alabama Courts (e.g. Gober, 8, 9, 11, 62, 63, 64). Finally, petitioners attempted to interrogate concerning the ordinance (Br. of Petitioners, 6, 7; Gober, 22-24; Davis, 23-25), but the evidence was excluded (Gober, 24; Davis, 25).

Respondent argues that no Motion to Exclude the Evidence is shown by the record in the case of Roosevelt Westmoreland. It is true that no Motion to Exclude is in the record of the *Westmoreland* Case, but it is clear from the Westmoreland record that such a motion was made and denied by the trial court. The judgment entry in Westmoreland states that (Westmoreland, 5):

> " . . . and the defendant files motion to exclude the evidence, and said motion being considered by the Court, it is ordered and adjudged by the Court that said motion be and the same is hereby overruled, to which action of the Court in overruling said motion, the defendant hereby duly and legally excepts."

Moreover, the Motion for New Trial in the *Westmoreland* Case alleges that the Court refused to grant the Motion to Exclude (Westmoreland, 8) and the Assignments of Error, Assignment 3 alleges error in refusing to grant the Motion to Exclude (Westmoreland, 32). Finally, the trial court ruled that, by stipulation, the motions in all the cases would be identical (Hutchinson, 33).

Respondent argues that the Motions to Exclude the Evidence did not contain a prayer for relief. This objection has no merit. The purpose of these motions is clear on their

face, and the Alabama Courts raised no question as to their form.

Respondent argues that the Motions to Strike and the demurrers did not specifically raise the question of the need for some identification of authority to ask Petitioners to leave the luncheon areas. This issue was, however, raised properly in the Motions to Exclude and the Motions for New Trial (e.g., Gober, 5-7) and was decided adversely to petitioners, on the merits, by the Alabama Courts (e.g., Gober, 8, 62, 63).

It is clear from the face of the records of these cases that petitioners raised constitutional questions at every opportunity in both the trial and appellate courts and that these questions were considered by the Alabama Courts and rejected on their merits. The Alabama Court of Appeals stated:

> Counsel has argued, among other matters, various phases of constitutional law, particularly as affected by the Fourteenth Amendment of the Federal Constitution, such as freedom of speech, in regard to which counsel state: "What has become known as a 'sit-in' is a different, but well understood symbol, meaningful method of communication." Counsel has also referred to cases pertaining to restrictive covenants. *We consider such principles entirely inapplicable to the present case.* (Emphasis added.) (Br. of Petitioners, 8a.)

III.

The importance of the issue: reasons why these cases should be heard here prior to disposition of other sit-in litigation.

Counting the ten convictions embraced by the instant certiorari petition, there are now pending before this Court, eleven separate certiorari petitions and jurisdictional statements dealing with state court criminal convictions growing out of the "sit-in" movement.[2]

It seems almost beyond dispute that each of these convictions poses constitutional issues of major dimension. Cf. *Garner* v. *Louisiana*, 7 L. ed. 2d 207. And their humble facts only serve to highlight the importance of the issues posed. Cf. *Yick Wo* v. *Hopkins*, 118 U. S. 356; *Thompson* v. *Louisville*, 362 U. S. 199.

But this concentration of cases poses a real problem of judicial administration. These multiple convictions merit careful review in the light of relevant constitutional princi-

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[2] *Drews* v. *State* (Jurisdictional Statement filed 29 U. S. L. Week 3286, No. 840, 1960 term; renumbered No. 71, 1961 term); *Williams* v. *North Carolina* (Petition for Cert. filed 29 U. S. L. Week 3319, No. 915, 1960 term; renumbered No. 82, 1961 term); *Avent* v. *North Carolina* (petition for cert. filed 29 U. S. L. Week 3336, No. 943, 1960 term; renumbered No. 85, 1961 term); *Fox* v. *North Carolina* (petition for cert. filed Id. No. 944, 1960 term; renumbered No. 86, 1961 term). *Randolph* v. *Commonwealth of Virginia* (petition for cert. filed 30 U. S. L. Week 3069, No. 248, 1961 term); *Henry* v. *Commonwealth of Virginia* (petition for cert. filed 30 U. S. L. Week 3123, No. 346, 1961 term); *Lombard* v. *Louisiana* (petition for cert. filed 30 U. S. L. Week 3234, No. 638, 1961 term); *Gober* v. *City of Birmingham* (petition for cert. filed 30 U. S. L. Week 3250, No. 691, 1961 term); *Thompson* v. *Commonwealth of Virginia* (petition for cert. filed 30 U. S. L. Week 3234, No. 655, 1961 term); *Peterson* v. *City of Greenville* (petition for cert. filed 30 U. S. L. Week 3274, No. 750, 1961 term). Cf. also *Shuttlesworth and Billups* v. *City of Birmingham* (petition for cert. filed 30 U. S. L. Week 3258, No. 721, 1961 term).

ples. And yet it may be, in view of this Court's manifold responsibilities in so many realms of public adjudication, that detailed sifting of the scores of somewhat varying factual situations underlying these eleven pending applications for review cannot be forthcoming immediately. Institutional limitations counsel recognition that this Court may feel compelled to select for initial adjudication from among the pending eleven applications the one or more whose facts may best illuminate constitutional judgments of widespread application and implication. Just as "wise adjudication has its own time for ripeness", *Maryland* v. *Baltimore Radio Store, Inc.*, 338 U. S. 912, 918, so too it may flower best when rooted deep in rich factual soil.

Viewed in this light, the instant petition for certiorari presents cases which seem peculiarly apt prototypes of the entire corpus of "sit-in" litigation. Another case which presents issues in almost the same way as the instant one, and to which much of what is said here applies, is *Peterson* v. *City of Greenville*, No. 750, October Term, 1961. In the cases represented by this certiorari petition, (1) there was a municipal ordinance requiring restaurant segregation; (2) at least one of the proprietors demonstrably shaped his business practices to conform to the segregation ordinance (although inquiry into the general impact of the ordinance was foreclosed by judicial rulings below); (3) in each case the proprietor welcomed Negro patronage in the part of his establishment not covered by the ordinance; (4) in none of the cases was a defendant ordered from the store by the proprietor or his agent; (5) in none of the cases were the police summoned by the proprietor or his agent; and (6) in each of the cases the defendant was arrested for and convicted of trespass notwithstanding the non-assertion by the proprietor of whatever theoretical claims he may have had to establish a policy of excluding Negroes (a) from his premises as a whole or (b) from his restaurant

facilities (assuming there had been no segregation ordinance precluding any such discretionary business judgment on the proprietor's part).

In short, the salient facts summarized above illustrate with compelling specificity many separately identifiable (albeit integrally connected) aspects of state action enforcing racial segregation. Thus, the cases represented in this certiorari petition seem particularly apt vehicles for further judicial exploration of the problems to which this Court first addressed itself in *Garner* v. *Louisiana, supra.*

CONCLUSION

WHEREFORE, for the foregoing reasons, it is respectfully submitted that the petition for writ of certiorari should be granted.

Respectfully submitted,

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February 23, 1962

Mr. Jack Greenberg
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Re: James Gober, et al
vs. CITY OF BIRMINGHAM

Dear Mr. Greenberg:

Enclosed please find copy of Brief filed on behalf of Respondent to Petition for Writ of Certiorari.

Yours very truly,

Watts E. Davis

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Assistant City Attorney

WED:ng
Encl.
AIR MAIL